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**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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**IN THE MATTER OF:**

Grand Pier Center, LLC

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CERCLA 106(b) Petition No. 04-01

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**RESPONDENT'S MOTION IN OPPOSITION TO PETITIONER'S  
MOTION FOR LEAVE TO FILE A REPLY BRIEF OR IN THE  
ALTERNATIVE MOTION FOR LEAVE TO FILE RESPONDENT'S  
INSTANTER SURREPLY BRIEF**

For the reasons stated below the Board should deny the Petitioner's motion for leave to file a reply brief. The Petitioner has failed to file its motion within a reasonable time and has failed to demonstrate any good cause for the Board to allow it to file a reply brief.

On April 22, 2005, sixty-six (66) days following the filing of its Response to Petitioner's Petition for Reimbursement (Response), Respondent, U.S. EPA, Region 5 received Petitioner's request to file a reply brief which was attached to its motion. The EAB Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (EAB Revised 106(b) Guidance) states at page 8, Section IV B. that "[b]riefs other than those expressly required or invited by the EAB may be submitted only with leave of the EAB." In addition, the EAB Revised 106(b) Guidance explains at page 5, Section III C. that "[t]he petition must set forth all legal arguments, factual contentions, ... and supporting evidence on which the petitioner relies in support of its claim for reimbursement." (Emphasis in original.) Pertinent

portions of Section III C. further explain that “[e]xcept as may be permitted by the EAB for good cause shown, ... a petitioner may not raise any issues during the petition review process that were not identified in the petition ... unless the petitioner demonstrates in a motion to the EAB that: (1) for new issues, such issues were not reasonably ascertainable as of the date the petition was filed; or (2) for new evidence or information, the petitioner could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed.” Petitioner baldly claims “good cause” but makes no attempt to demonstrate in its motion that any of the above cited conditions are met. Rather, Petitioner alleges two reasons for the need for a reply brief and refers the Board to the reply brief that it has submitted with its motion.

First, the Petitioner complains that the Response contains misstatements of law that it must counter. Second, Petitioner complains that the Response contain an operator argument that is being made for the first time and should be waived. Petitioner, however, argued in Paragraph 20 of its Petition that it was never an owner or operator of the off-site sidewalk right-of-way under CERCLA Section 107(a). U.S. EPA, Region 5's Response simply examined and responded to issues that Petitioner raised in its Petition. Nowhere does Petitioner claim, however, that the Response raised new issues, evidence or information that Petitioner could not have known of or could not have anticipated its relevance or materiality. Neither of Petitioner's arguments in its Motion For Leave To File A Reply bother to address, much less satisfy, the EAB's criteria for filing a reply brief.

U.S. EPA, Region 5 filed its Response to the Petitioner's Petition for Reimbursement on February 16, 2005. Petitioner waited more than sixty (60) days to file any motion to reply and included its reply brief with its motion. The time and place for Petitioner to refute its liability under CERCLA Section 107(a) was in its Petition. Having failed to raise all issues and arguments in its Petition, Petitioner cannot do so in a reply brief, because the 60 day deadline for filing its petition has passed. It is Petitioner, not U.S. EPA Region 5, who has waived arguments with respect to liability. The Petitioner offers nothing more than a complaint that U.S. EPA, Region 5 has responded to Petitioner's argument that it is not a liable party under CERCLA Section 107(a).

Further, Petitioner cannot claim that it could not reasonably have known of the existence of new information or evidence because U.S. EPA, Region 5's Response was based upon information contained in the administrative record or information supplied to U.S. EPA, Region 5 during the course of the removal action by the Petitioner. Petitioner also could have reasonably anticipated that U.S. EPA, Region 5 would have used the information that Petitioner provided during the course of cleanup to refute Petitioner's claim that it was not a liable party under CERCLA.

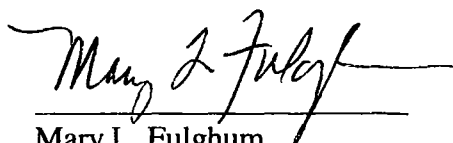
Finally, Petitioner's request for leave to reply is untimely under any measure of reasonableness. The EAB's Revised 106(b) Guidance does not set forth a schedule for the filing of a reply to a response to a petition. Nonetheless, a motion to file a reply brief, made more than 60 days following a response is indefensible and should not be allowed. Neither the EAB Practice Manual, which provides for responses to motions in permit proceedings within 15 days and petitions for review of U.S. EPA permit decisions within the 30 days, nor the Federal Rules

of Civil Procedure which provide for 20 days to counterclaim (Fed. Civ. R. P. 12 motion), allow such a long periods of time to file a responsive motion.

In sum, the purpose of the Petitioner's untimely request to file a reply brief is its desire to augment its Petition. Although Petitioner claims good cause, it otherwise neglects to meet the EAB Revised 106(b) Guidance express conditions for submitting additional briefs. Petitioner tries to justify the request by merely claiming that the U.S. EPA, Region 5 Response contains misstatements of law. Petitioner further argues that U.S. EPA must waive its response to an argument that the Petitioner specifically raised in its Petition. These claims are insufficient reasons to grant Petitioner's request.

For the above stated reasons, after reviewing the Petitioner's motion, the Respondent requests that the Board deny the Petitioner's motion for leave to file a reply brief and strike the brief attached to Petitioner's motion. In the alternative, if the Board grants the Petitioner's request, then Respondent requests the Board to grant leave to file Respondent's Instanter Surreply Brief. See Respondent's Instanter Surreply Brief attached hereto.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary L. Fulghum", with a horizontal line drawn underneath it.

Mary L. Fulghum  
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